

Mr. Lever

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-195810.2

DATE: June 19, 1981

MATTER OF: Hudspeth Sawmill Company

DIGEST:

1. GAO will consider protest objecting to cancellation of timber sale following protester's rescission of its election under 16 U.S.C. § 472a(i) (1976) to have Forest Service build necessary roads even though Federal District Court earlier ruled that Forest Service could condition award of sale on protester's rescinding its election. Protester is not challenging agency's right to refuse to award sale unless protester rescinded its election, but rather agency's right to cancel sale after protester rescinded its election beyond deadline established by agency.
2. Protest objecting to cancellation of timber sale after protester rescinded its election to have Forest Service build roads is timely where filed within 10 working days of notification of cancellation since protester is not challenging agency's establishment of 120 day period for protester to rescind its election but rather agency's decision to cancel sale notwithstanding fact protester rescinded its election after deadline but prior to cancellation.
3. Forest Service is required to have compelling reason to cancel timber sale after bids have been opened and prices exposed since resolicitation tends to compromise integrity of competitive bidding system and Forest Service is required under 16 U.S.C. § 472a(e)(1)(A) (Supp. III, 1979) to use bidding methods which "insure open and fair competition."

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4. Forest Service had compelling reason to cancel timber sale notwithstanding fact that protester ultimately rescinded election prior to cancellation. Where prospectus and regulations clearly indicated award of timber sale would not be made unless agency received acceptable road construction bid within 120 days, protester was given additional 120 days to rescind election, and election was not rescinded until two-and-a-half months after deadline passed, agency could reasonably conclude protester obtained unfair advantage not afforded to other bidders and integrity of competitive bidding system would be better served by resolicitation.

Hudspeth Sawmill Company protests the Forest Service's cancellation of the "No-Name Cabin Timber Sale." Hudspeth argues there was no compelling reason to cancel the sale and that therefore the Forest Service's action was improper. We deny the protest.

BACKGROUND

On August 18, 1978, the protester received a prospectus from the Forest Service announcing the "No-Name Cabin Timber Sale" and inviting the submission of sealed bids. Thereafter, on September 7, 1978, the date of bid opening, Hudspeth submitted a bid equal to the solicitation's minimum acceptable bid price of \$462,431. Hudspeth also, in accordance with the National Forest Management Act of 1976, as amended, 16 U.S.C. § 472a(i) (1976), elected as a small business to have the Forest Service build the roads necessary to harvest and remove the timber purchased. Inasmuch as Hudspeth's bid was the only bid received and equaled the minimum acceptable bid price, customary oral auction was waived and Hudspeth was declared the high bidder.

The Forest Service then solicited bids for the required road construction. Although 162 firms were solicited, only one bid was received at \$837,296.36. This bid, however, was rejected as unreasonable, because it exceeded the Forest Service's estimate by 54 percent. Following an exchange of correspondence, the Forest Service on January 12, 1979, notified Hudspeth that unless it rescinded within 120 days of January 5 its election to have the Forest Service build the roads and accepted the road construction requirements itself, the timber sale would be canceled.

[Protest of Forest Service Cancellation of Timber Sale]

Shortly before the May 5, 1979 deadline for rescission of its election, Hudspeth filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief to restrain the Forest Service from canceling the sale unless Hudspeth agreed to build roads. Hudspeth Sawmill Company v. Bergland, et al. (Civil Action No. 79-1179). Essentially, Hudspeth contended that it had a statutory right as a small business to elect to have the Forest Service build the roads and that the Forest Service regulations which provide the agency could condition the award of a sale upon receipt of a satisfactory road bid were inconsistent with the underlying statute. See 36 C.F.R. § 223.5 (1978).

In light of the suit, the parties agreed that the Forest Service would take no action with respect to the sale during the pendency of the District Court action. Thereafter, on June 13, 1979, the District Court dismissed Hudspeth's suit with prejudice. Hudspeth then appealed the court's decision and attempted to work out an agreement staying any Forest Service action with respect to the sale until the conclusion of Hudspeth's appeal. However, apparently as a result of a failure to reach an agreement, Hudspeth notified the Forest Service on July 20, 1979, that it was rescinding its election and would agree to construct the roads. Subsequently, by letter dated August 13, the Forest Service notified Hudspeth that it was canceling the sale and Hudspeth filed a protest challenging this action with our Office.

In Hudspeth Sawmill Company, B-195810, March 7, 1980, 80-1 CPD 181, we declined to consider Hudspeth's protest of the Forest Service's cancellation of the "No-Name Cabin Timber Sale" because Hudspeth's appeal from the District Court's decision was still pending with the Court of Appeals for the District of Columbia and because a decision in Hudspeth's favor would moot the entire basis of Hudspeth's protest before our Office since the court could direct award to Hudspeth. We noted, however, that it might be appropriate to consider Hudspeth's protest in the future depending on the outcome of the protester's appeal. Thereafter, the Court of Appeals affirmed the District Court decision without an opinion and Hudspeth resubmitted its protest to our Office.

PROTESTER'S ALLEGATIONS

Hudspeth maintains that there was no compelling reason to cancel the sale in light of its rescission of its election to have the Forest Service build the necessary roads and therefore the cancellation was improper. See, e.g., Lakeside Corporation, et al., B-194471, August 2, 1979, 79-2 CPD 75; The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19. In this regard, Hudspeth contends that it rescinded its election in a timely fashion, essentially maintaining that the Forest Service agreed to extend the May 5, 1979 deadline when it agreed to stay any action with respect to the sale until after the District Court's decision. Hudspeth further asserts that it is clear the parties intended for the agreement to extend the deadline regardless of the express terms of the agreement. The protester argues that it would have been an inconsistent and unnecessary act to rescind its option while the matter was pending before the District Court and that the Forest Service was aware of this fact. The protester further argues that it could not be expected to rescind its option while negotiations were ongoing regarding a total stay, especially since it was advised that there was a good chance that the Forest Service would agree to a total stay for a reasonable period of time.

Hudspeth also contends that even if it rescinded its election subsequent to the deadline, no compelling reason existed to cancel the sale. In this connection, Hudspeth asserts that since the terms of the sale provided for purchaser payments on an escalated basis, an award to Hudspeth under the sale would result in Hudspeth paying more for the timber when harvested than the rates it originally bid due to an increase in market prices for raw timber. Thus, the protester contends that it gained no advantage by not rescinding its option until approximately 10 months after bids were opened. Furthermore, Hudspeth asserts that the Forest Service has not established that the Government would receive a higher bid upon resolicitation. In fact, the protester contends that increased costs of lumbering and road construction and a decrease in the market price for finished wood products from the timber in question make such a result unlikely.

Finally, Hudspeth argues that an award to it under the present circumstances is appropriate because there is no demonstrable prejudice to another party since Hudspeth's was the only bid received. Under these circumstances, the

protester contends that the interest in preserving the integrity of the competitive bidding system outweighs any speculative prejudice to other prospective bidders.

AGENCY'S RESPONSE

The Forest Service objects to our consideration of Hudspeth's protest. The Forest Service argues that its right to cancel the sale due to Hudspeth's refusal to build the roads has been previously litigated and decided by the District Court and Court of Appeals opinions and therefore Hudspeth should not be permitted to relitigate this issue. The agency also argues that Hudspeth's protest is untimely under our Bid Protest Procedures, 4 C.F.R. Part 20 (1980). In this connection, the Forest Service maintains that the protester is essentially challenging the 120 day period it set for Hudspeth to rescind its election and therefore Hudspeth should have filed its protest within 10 working days of the January 12, 1979 letter notifying Hudspeth of the 120 day period. Consequently, the Forest Service believes that Hudspeth's initial protest to our Office filed on August 13, 1979 is untimely under 4 C.F.R. § 20.2(b)(2).

The Forest Service further contends that in any event, Hudspeth's protest is without merit. The Forest Service denies that Hudspeth rescinded its election in a timely fashion. The Forest Service asserts that under the terms of its January 12, 1979 letter, Hudspeth had until May 5, 1979 to rescind its election and that at no time did the Forest Service intend or consider the deadline to have been extended. In this regard, the agency maintains that it never agreed to extend the deadline but merely agreed not to cancel and readvertise the sale until after the District Court ruled on Hudspeth's motion for preliminary injunction. The agency also asserts that the fact that it considered the protester's request for a total stay pending a ruling on Hudspeth's appeal is of no consequence since the agency never agreed to such a stay.

The Forest Service also argues that it was not required to have a compelling reason to cancel the sale. In this connection, the Forest Service, citing Hi-Ridge Lumber Co. v. United States, 443 F.2d 452, 455 (9th Cir. 1971) and S&S Logging Co. v. Barker, 366 F.2d 617, 624 (9th Cir. 1966), asserts that the Secretary of Agriculture is vested

with broad discretion in deciding whether to make a sale and that the Secretary can cancel a sale "with or without reason."

The Forest Service further argues that in any event the cancellation was justified. The agency states that a decision to cancel the sale and resolicit offers was reached only after consideration of all the facts and circumstances, including the effect of its decision on future sales and its duty to protect the public interest. The Forest Service contends that "timber purchasers should not be encouraged to attempt delay of the award process by various tactics so as to gain financial advantage." The agency also contends that to allow bidders, such as Hudspeth, to delay the award process would adversely affect its ability to effectively manage timber sales. The Forest Service further asserts that Hudspeth was afforded an ample opportunity to decide whether to rescind its election, that Hudspeth was permitted a cost-free option to watch a fluctuating timber market for eight months from September 8, 1978 to May 5, 1979 and that providing Hudspeth an additional three months to accept the contract is contrary to the public interest and the interests of other potential purchasers.

DECISION

We do not agree, as argued by the Forest Service, that the question presented by Hudspeth's protest was previously litigated and decided by the District Court and Court of Appeals. As recognized by our earlier decision dismissing Hudspeth's initial protest, the issue of Hudspeth's rescission and the propriety of the Forest Service's cancellation of the sale following the protester's rescission of its election was not before the District Court or the Court of Appeals. Rather, the sole issue presented by Hudspeth's suit was the right of the Forest Service to condition the sale on Hudspeth's rescission of its election to have the Forest Service build the required roads. The fact that the District Court concluded that the Forest Service could so condition the sale does not preclude us from considering whether the Forest Service could properly cancel the sale following the protester's rescission of its election.

We also do not agree that Hudspeth's protest is untimely. Hudspeth is not, in its protest to our Office, objecting to the establishment of the 120 day period for

the rescission of its election or the conditioning of the sale upon its rescission, but rather to the agency's cancellation of the sale subsequent to Hudspeth's rescission of its election. Thus, we believe the timeliness of Hudspeth's protest should be measured from the time Hudspeth was notified of the Forest Service's intention to cancel and readvertise the sale. Inasmuch as Hudspeth was notified of the cancellation on August 13, 1979, its protest to our Office on the same day is clearly timely.

Furthermore, we do not agree with the Forest Service's assertion that it is not required to have a compelling reason to cancel a timber sale once bids have been opened and prices exposed. In Lakeside Corporation, et al., supra, and The Intermountain Company, supra, we recognized that a compelling reason was necessary to cancel a timber sale once bids have been opened. This is because, as indicated by the Court of Claims in Massman Construction Company v. United States, 102 Ct. Cl. 699, 60 F. Supp. 635, cert. denied, 325 U.S. 866 (1945), resolicitation of bids after bid prices have been exposed tends to compromise the integrity of the competitive bidding system, thereby discouraging competition. Although the Forest Service argues that the principle set forth in Massman is not applicable because the procurement statutes and regulations do not apply to timber sales and because the Secretary of Agriculture has wide discretion in deciding whether to make a sale, we are not persuaded by this argument.

Under the National Forest Management Act of 1976, as amended, the Secretary of Agriculture is required to use bidding methods which "insure open and fair competition." 16 U.S.C. § 472a(e)(1)(A) (Supp. III, 1979). In our opinion, permitting the Secretary to in effect cancel a sale "without reason" would not comport with this statutory mandate since as noted above resolicitation tends to discourage competition. Although it is true that the 9th Circuit indicated in Hi-Ridge and S&S Logging, supra, that the Secretary has wide discretion in deciding whether to make a sale and in fact held that such a decision was not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (1976), we do not find these cases to be controlling. Both Hi-Ridge and S&S Logging concerned sales made under statutory provisions

which have been repealed by the National Forest Management Act of 1976 and which did not contain a requirement for procedures which "insure open and fair competition." Thus, even if those cases stand for the proposition that the Secretary could, at one time, cancel a sale "without reason," we believe they are not applicable to sales made by the Secretary under current law.

Nevertheless, we are unable to find that the cancellation of the sale was improper.

A protester has the burden of affirmatively proving its assertions and such a burden has not been met where the only probative evidence of an asserted fact is the contradictory assertions of the protester and the agency in question. James R. Parks Co., B-186031, June 16, 1976, 76-1 CPD 384. Although Hudspeth maintains that the Forest Service agreed to extend the deadline for rescinding its election, the Forest Service denies the deadline was extended or otherwise postponed. Consequently, we can not find the Forest Service expressly agreed to extend the deadline. We are also unable to find that the parties intended for the deadline to be extended or that the Forest Service knew Hudspeth interpreted the agreement as extending the deadline. Although Hudspeth states that it would have been inconsistent and unnecessary for it to rescind its election during the pendency of the District Court litigation and that the Forest Service was well aware of this fact, we do not agree. In our opinion, Hudspeth could have conditionally rescinded its election. In other words, Hudspeth could have, prior to the passing of the deadline, agreed to build the roads in the event the District Court ruled against its motion for a preliminary injunction. Under these circumstances, we cannot conclude that the Forest Service intended for the deadline to be extended or that the Forest Service knew that Hudspeth so interpreted the agreement.

Furthermore, we believe the Forest Service had a compelling reason to cancel the sale regardless of the fact that Hudspeth ultimately rescinded its election prior to the Forest Service canceling the sale.

The timber sale prospectus and the Forest Service regulations (36 C.F.R. § 223.5) clearly indicated that award of the sale would not be made where the successful bidder elected to have the Forest Service build the necessary

roads unless the agency received an acceptable road construction bid within 120 days after the successful bidder was declared the high bidder. In addition, once that period passed, during which the Forest Service failed to receive an acceptable road construction bid, Hudspeth was given an additional 120 days to decide whether to rescind its election. Furthermore, it was not until July 20, 1979, more than 10 months after Hudspeth was declared the high bidder and two-and-a-half months after the rescission deadline passed, that Hudspeth rescinded its election. Under these circumstances, we feel the Forest Service could reasonably conclude that an award to Hudspeth would not be in the public interest, particularly with respect to the potential for abuse by prospective timber purchasers and its ability to effectively manage timber sales in the future.

Although Hudspeth argues that it did not obtain a competitive advantage over any other potential bidders since the solicitation provisions provided for payment for timber harvested on an escalated basis, and that the competitive bidding system would be better served with an award under the original solicitation, we are not convinced. During the months following Hudspeth's being requested to rescind its election, Hudspeth in effect had a no-cost option under which it could examine the market and decide whether to purchase the timber. While it was clear during the period which followed Hudspeth's filing its suit that the protester was interested in purchasing the timber, it was not clear that it was interested in purchasing the timber if it had to build the roads.

Accordingly, we believe the Forest Service could reasonably conclude that Hudspeth had obtained a competitive advantage not afforded to other potential bidders and that the competitive bidding system would be better served by canceling the solicitation and resoliciting bids than by awarding the sale to Hudspeth.

The protest is denied.


Acting Comptroller General
of the United States